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In the Supreme Court of the United States

OCTOBER TERM, 1977

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	5
Argument	10
I. Cash payments made by an employer to reimburse his employees for the cost of noon meals consumed during non-overnight travel are "wages" subject to withholding taxes	10
A. Introduction	10
B. The meal allowances paid by petitioner to its employees are compensatory "remuneration for services" within the meaning of Section 3401 (a)	14
C. The meal allowances are not reimbursements for deductible business expenses	25
II. If the meal allowances are wages, the Commissioner's assessment of unpaid withholding taxes against petitioner for an open year under the statute of limitations was a proper exercise of his authority to enforce the internal revenue laws	31
Conclusion	36
Appendix	1A

244-267—77——1

CITATIONS

Cases:

	Page
Acacia Mutual Life Insurance Co. v. *United States,* 272 F. Supp. 188	27
Ahrens v. *United States,* 264 F. Supp. 518	33
Allstate Insurance Co. v. *United States,* 530 F. 2d 378	29
Armour & Co. v. *Wantock,* 323 U.S. 126	23
Campbell Sash Works, Inc. v. *United States,* 217 F. Supp. 74	20–21
Central Tablet Mfg. Co. v. *United States,* 417 U.S. 673	24
Chandler v. *Commissioner,* 226 F. 2d 467	34
Commissioner v. *Jacobson,* 336 U.S. 28	15
Commissioner v. *National Alfalfa Dehydrating & Milling Co.,* 417 U.S. 134	24
Commissioner v. *Smith,* 324 U.S. 177	18
Education Fund of the Electrical Industry v. *United States,* 426 F.2d 1053	16
Hanson v. *Commissioner,* 298 F.2d 391	34
Herrin v. *Commissioner,* 28 T.C. 1303	35
Humble Oil & Refining Co. v. *United* States, 442 F.2d 1362	29, 32
LoBue v. *Commissioner,* 22 T.C. 440, affirmed, 223 F.2d 367, reversed and remanded, 351 U.S. 243	7, 8, 17, 21
Old Colony Trust Co. v. *Commissioner,* 279 U.S. 716	17
Osteen v. *Commissioner,* 14 T.C. 1261	35
Otte v. *United States,* 419 U.S. 43	19
Patterson v. *Thomas,* 289 F.2d 108, certiorari denied, 368 U.S. 837	27
Peoples Life Insurance Co. v. *United States,* 373 F.2d 924	27

Cases—continued

	Page
Peurifoy v. *Commissioner,* 358 U.S. 59	28
Royster Co. v. *United States,* 479 F.2d 387	*passim*
Rudolph v. *United States,* 370 U.S. 269	27
Scott v. *Kelm,* 110 F. Supp. 819	34
Social Security Board v. *Nierotko,* 372 U.S. 358	7, 8, 18, 20, 23
Stubbs, Overbeck & Associates, Inc. v. *United States,* 445 F.2d 1142	28
United States v. *Correll,* 389 U.S. 299	9, 13, 25, 32, 34
United States v. *Woodall,* 255 F.2d 370, certiorari denied, 358 U.S. 824	21
Welch v. Helvering, 290 U.S. 111	25
Williams v. *Patterson,* 286 F.2d 333	34

Statutes and regulations:

Current Tax Payment Act of 1943, 57 Stat. 126	10
Internal Revenue Code of 1954 (1958 ed. or 1970 ed., as amended by the Tax Reform Act of 1976, Pub. L. 94–455, 90 Stat. 1520)	2, 11
Section 61	2, 1A
Section 61(a)	11, 13, 14, 1A
Section 61(a)(1)	6, 8, 12, 13, 15, 21, 1A
Section 63(a)	14
Section 102(a)	14–15
Section 112	30
Section 119	13
Section 162	13
Section 162(a)	9, 25
Section 162(a)(2)	25
Section 217	29

Statutes and regulations—continued

	Page
Section 262	25, 26
Section 3401	2, 4, 1A
Sections 3401–3403	11
Section 3401(a)	*passim*, 1A–2A
Section 3401(a)(1)	26, 30
Section 3401(a)(8)(A)(ii)	26
Section 3401(a)(15)	26, 29
Section 3401(d)	19
Section 3402	2, 4, 2A
Section 3402(a)	11, 2A
Section 3403	2, 11, 35, 2A
Sections 4061 *et seq*	35
Section 6201(a)	10, 31
Section 6416(a)(1)	35
Section 6501(a)	32
Section 7801	32
Section 7802	32
Revenue Act of 1942, 56 Stat. 798 *et seq.*:	
Section 117	30
Section 172	10
Tax Reform Act of 1976, Pub. L. 94–455, 90 Stat. 1520, 1557	11
Treasury Regulations on Employment Taxes (1954 Code) (26 C.F.R.):	
Section 31.3121(a)–1	2, 2A
Section 31.3121(a)–1(f)	19, 2A–3A
Section 31.3401(a)–1(a)	2, 3A
Section 31.3401(a)–1(a)(2)	12, 3A
Section 31.3401(a)–1(a)(3)	12, 3A
Section 31.3401(a)–1(b)(2)	8, 25, 33, 3A
Treasury Regulations on Income Tax (26 C.F.R.):	
Section 1.61–2(a)(1)	13
Section 1.162–2(b)(2)	28

Miscellaneous:

	Page
H.R. Doc. No. 237, 78th Cong., 1st Sess. (1943)	10–11
H.R. Rep. No. 268, 78th Cong., 1st Sess. (1943)	11
H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935)	19
I.T. 3395, 1940–2 Cum. Bull. 64	26, 32
Rev. Rul. 59–371, 1959–2 Cum. Bull. 236	28
Rev. Rul. 69–592, 1969–2 Cum. Bull. 193	26
S. Rep. No. 628, 74th Cong., 1st Sess. (1935)	19
S. Rep. No. 1631, 77th Cong., 2d Sess. (1942)	30

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (Pet. App. A 1a–4a) is reported at 405 F. Supp. 748. The opinion of the court of appeals (Pet. App. B 5a–12a) is reported at 540 F.2d 300.

JURISDICTION

The judgment of the court of appeals (Pet. App. C 13a) was entered on August 17, 1976. On November 4, 1976, the court of appeals denied a petition for rehearing filed by petitioner (A. 30). The petition for a writ of certiorari was filed on February 1, 1977,

and was granted on May 2, 1977 (A. 31). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 3401(a) of the Internal Revenue Code of 1954 defines "wages" for purposes of the withholding tax provisions to include "all remuneration * * * for services performed by an employee for his employer."

The questions presented are:

1. Whether cash payments made by an employer to reimburse his employees for the cost of noon meals consumed in the course of non-overnight travel are "wages" subject to withholding taxes.

2. Whether, if such payments are "wages," the Commissioner's assessment of unpaid withholding taxes against petitioner for an open year under the statute of limitations was a proper exercise of his statutory authority to enforce the internal revenue laws.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 61, 3401, 3402 and 3403 of the Internal Revenue Code of 1954, as amended (26 U.S.C. (1958 ed.)) and of the Treasury Regulations on Employment Taxes (1954 Code), Sections 31.3121(a)–1 and 31.3401(a)–1(a) (26 C.F.R.), are set forth in the Appendix, *infra,* pp. 1A–3A.

STATEMENT

Petitioner is a public utility engaged in the generation, transmission, distribution, and sale of electric energy and the distribution and sale of natural gas in Illinois. In order to cover the geographical area

which it serves, it is often necessary for petitioner to dispatch its employees on travel assignments, on both day trips during normal working hours and overnight travel (Pet. App. B 7a).

Petitioner maintains a policy of reimbursing its employees for expenses incurred for transportation, meals and lodging while traveling on company business. In the case of the non-overnight travel at issue in this case, petitioner reimburses its employees for the cost of their noon meals consumed away from their normal duty station. The amount of the reimbursement varied with the status of the employee (Pet. App. B 7a).

During 1963, the taxable year at issue, petitioner reimbursed its union employees and its operating employees of the only non-unionized division for noon meals consumed away from their normal duty station. The reimbursement was not to exceed $1.40 per noon meal.[1] This amount was fixed in the union's collective bargaining agreement with petitioner (Pltf. Ex. 2, pp. 23–24; Pltf. Ex. 3, pp. 22–23). Other more senior salaried employees were reimbursed for their actual expenses up to $25 per meal (Pet. App. B 7a; Tr. 29–30, 44–46).[2]

The employee entitled to the $1.40 per meal payment claimed the allowance on a company form that he submitted to his supervisor for approval (Tr. 32;

[1] In 1960, the noon meal reimbursement was $1.30. In 1961, the union negotiated an increase to $1.40 (Tr. 93).

[2] "Tr." refers to the trial transcript.

244-267—77——2

Pltf. Exs. 6, 7, 8). In many cases, the employee claimed and received the full amount whether or not he actually incurred out-of-pocket lunch expenses in that amount—*e.g.*, when he brought his lunch from home (Pet. App. B 7a; Tr. 58–59).

During 1963, petitioner paid its employees $139,936.12 in reimbursements for noon meals consumed while away from their normal duty stations on non-overnight trips. These amounts were included in the employees' pay checks. However, petitioner did not withhold any taxes from these payments (Pet. App. A 2a; Pet. App. B 7a; Tr. 63). On audit, the Commissioner of Internal Revenue determined that the meal reimbursements paid by petitioner to its employees were "wages" subject to withholding pursuant to Sections 3401 and 3402 of the Internal Revenue Code of 1954. The Commissioner accordingly assessed additional withholding taxes of $36,615.72, which petitioner paid (Pet. App. B 7a).

In this refund suit brought by petitioner in the United States District Court for the Southern District of Illinois, the district court held that the meal payments were not wages subject to withholding (Pet. App. A 1a–4a). The district court cited the fact that the "[employee] renders no service to the company during his lunch" because "[he] was off duty during this time. His time was his own" (Pet. App. A 4a). In so holding, the district court was persuaded by the similar views expressed in *Royster Co.* v. *United States,* 479 F. 2d 387 (C.A. 4) (Pet. App. A 4a).

The court of appeals unanimously reversed. It held that the meal payments at issue were part of the total benefits paid by petitioner for the services of its employees and therefore were remuneration for employee services or "wages" subject to withholding (Pet. App. B 5a–12a). Accordingly, the court of appeals rejected the decision of the Fourth Circuit in *Royster Co.* v. *United States, supra,* which held that similar payments were not wages because the employees "performed no services while eating, directly or indirectly" (479 F. 2d at 391; Pet. App. B 11a). The court of appeals stated: "Remuneration for services cannot be viewed this narrowly. The employment relationship is a two-sided bargain, with the employee's services being given for a total package of remuneration, including salary, pension, paid vacation time and other remuneration such as reimbursed lunches" (Pet. App. B 11a).

SUMMARY OF ARGUMENT

I.

1. Petitioner's cash payments made to reimburse its employees for the cost of noon meals consumed during non-overnight travel are "wages" subject to withholding taxes.

Section 3401(a) of the Internal Revenue Code of 1954 defines "wages" for purposes of the withholding provisions to include "all remuneration * * * for services performed by an employee for his employer, including the cash value of all remuneration paid in

any medium other than cash * * *." This definition of "wages" corresponds to the first category of "gross income" set forth in Section 61(a)(1)—"Compensation for services, including fees, commissions, and similar items" that are paid in the context of an employer-employee relationship.

Petitioner argues that the reimbursements are not "wages" subject to withholding because they are non-compensatory payments made in furtherance of its business. The record, however, fully supports the court of appeals' conclusion that the meal allowances were compensatory. Petitioner required its employees to perform their assigned services at places it determined. In return for those services, the employees became entitled to certain agreed-upon benefits pursuant to the union contract. If an employee worked at his normal duty station, he received his salary; if he were assigned to a more remote location on non-overnight travel, he received both his salary and the meal allowance. Conversely, if the employee performed no services, he would receive neither salary nor the meal allowance.

Hence, there was a direct causal connection between the receipt of the meal allowance and the performance of services. As the court of appeals correctly observed, the meal allowances were "part of a total package of remuneration designed to attract and hold good employees to the company" (Pet. App. B 11a). Accordingly, they were "remuneration * * * for services performed by an employee for his employer" and therefore "wages" under Section 3401(a).

2. The decision below is fully in accord with this Court's longstanding definition of compensation for purposes of the tax statutes. As the Court stated in *Commissioner* v. *Lo Bue*, 351 U.S. 243, 247, "[w]hen assets are transferred by an employer to an employee to secure better services they are plainly compensation. * * * LoBue received a very substantial economic and financial benefit from his employer prompted by the employer's desire to get better work from him. This is 'compensation for personal service' within the meaning of § 22(a) [of the 1939 Code]." Likewise, in *Social Security Board* v. *Nierotko*, 327 U.S. 358, the Court ruled that a payment by an employer to his employee did not have to be tied to the performance of any particular service in order to qualify as "wages" under the comparable definition of the Social Security Act. In so holding, the Court observed "that 'service' as used by Congress in the definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer" (*id.* at 365–366; footnote omitted).

The meal allowances at issue here are not different from special bonuses, bargain stock options, housing allowances, vacation pay, or reimbursements for personal expenses such as school tuition or income taxes. An employer need not provide such benefits in return for a specific service. To the contrary, he extends them to his employee "to enlist more efficient service," "to secure better services," or because of "the employer's desire to get better work from him."

Commissioner v. *LoBue, supra,* 351 U.S. at 247. For purposes of the tax law, there is accordingly no difference between such benefits and traditional wage or salary payments. They are both taxable "compensation for personal services" under Section 61(a)(1) and "remuneration * * * for services performed by an employee for his employer" under the equivalent definition of "wages" of Section 3401(a).

3. The court of appeals properly concluded that *Royster Co.* v. *United States,* 479 F. 2d 387 (C.A. 4), was wrongly decided. There, the court held that similar payments for noon meals consumed by salesmen engaged in non-overnight travel were not "wages" subject to withholding because the salesmen performed no services while eating. But that rationale cannot be reconciled with this Court's definition of "service" under the analogous social security provisions as including "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Social Security Board* v. *Nierotko, supra,* 327 U.S. at 365–366 (footnote omitted).

4. Finally, there is no basis for petitioner's argument that the meal allowances fall within the exclusion from wages for "[a]mounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred * * * in the business of the employer * * *." Treasury Regulations, Section 31.3401(a)-1(b)(2). The phrase "ordinary and necessary expenses" is a statutory term of art that refers to deductible business

expenses under Section 162(a) of the Code. But in *United States* v. *Correll,* 389 U.S. 299, the Court held that the cost of meals consumed during non-overnight travel was not a deductible business expense under Section 162(a). Since the employees could not deduct the cost of such meals, the exclusion of the Regulation is inapplicable. The meal allowances are therefore fully includable in the employees' taxable income and are properly subject to withholding taxes.

II.

If the Court holds, in accordance with our submission, that the meal allowances are "wages" subject to withholding, the Commissioner's assessment for 1963 was a proper exercise of his authority to enforce the internal revenue laws. Petitioner argues that it is nevertheless entitled to prevail in this refund suit because it was reasonable for it to believe in 1963 that the meal allowances were not wages and that such belief should override what would otherwise be a valid timely assessment. But the Commissioner's position with respect to the meal allowances is precisely the same as it was in 1963. Then, as now, the Commissioner maintained that the costs of meals consumed during non-overnight travel were non-deductible personal expenses. Indeed, the Commissioner first announced his position in 1940, prior to the enactment of the withholding tax provisions.

Thus, petitioner had ample notice since 1940 that the Commissioner regarded the meal allowances as fully includable in its employees gross income without any deduction or offset. Since the meal allowances did

not qualify as deductible business expenses to the employees, there was no factual or legal basis upon which petitioner could have concluded that its meal allowances were not subject to withholding. The Commissioner's determination should therefore be upheld as a proper exercise of his authority to assess all taxes (Section 6201(a)) within the applicable period of limitations.

ARGUMENT

I.

CASH PAYMENTS MADE BY AN EMPLOYER TO REIMBURSE HIS EMPLOYEES FOR THE COST OF NOON MEALS CONSUMED DURING NON-OVERNIGHT TRAVEL ARE "WAGES" SUBJECT TO WITHHOLDING TAXES

A. INTRODUCTION

This federal income tax case involves the scope of the statutory definition of "wages" from which employers are required to withhold taxes. Since 1942, the withholding tax system has been an integral part of the administration of the internal revenue laws. As a practical matter, Congress recognized that the higher wartime rates made it difficult for persons to pay their tax liabilities at the time they filed their return after the close of the taxable year. By requiring the collection of income taxes at their source, Congress sought to prevent the loss of large amounts of revenue that would not be collected because of the time interval between the receipt of income and the filing of the returns reporting such income. See Revenue Act of 1942, Section 172, 56 Stat. 884; Current Tax Payment Act of 1943, 57 Stat. 126; H.R. Doc. No. 237, 78th

Cong., 1st Sess. 1 (1943); H.R. Rep. No. 268, 78th Cong., 1st Sess. 1-2 (1943).

The current statutory provisions are set forth in Sections 3401–3403 of the Internal Revenue Code of 1954, as amended.[3] Section 3402(a) provides that "[e]very employer making payment of wages shall deduct and withhold upon such wages" a tax determined in accordance with tables prescribed by the Secretary. Section 3403 makes the employer liable for the payment of the tax. This case focuses upon the statutory definition of "wages," the type of income that Congress determined to be subject to the withholding tax.

Section 3401(a) defines "wages" to include "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash * * *." The question presented is whether cash payments made by an employer to reimburse his employees for the cost of noon meals consumed during non-overnight travel are "wages" within the meaning of Section 3401(a).

There is a necessary although not entirely congruent relationship between the statutory concept of "gross income" (Section 61(a) of the Code) and the definition of "wages" at issue in this case. As the enumerated list in Section 61(a) of what constitutes "gross income" shows, the concept encompasses the

[3] The pertinent provisions of the statutes involved are retained in the amendments made by the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, 1557.

244-267—77——3

entire gamut of receipts—compensation for services, interest, rents, royalties, dividends, alimony, pensions, etc. If an item does not fall within the broad category of gross income, it cannot constitute wages subject to withholding taxes.

Conversely, not every item of gross income is wages subject to withholding. The statutory definition limits "wages" to "all remuneration * * * for services performed by an employee for his employer." Accordingly, the essential characteristic of "wages" is that they are compensation for services in the context of the employer-employee relationship.

In determining whether a particular item constitutes "wages," the name by which it is designated is immaterial. "Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of the statute if paid as compensation for services performed by the employee for his employer." Treasury Regulations, Section 31.3401(a)–1(a)(2), Appendix, *infra*, p. 3A. The basis upon which remuneration is paid is likewise irrelevant in determining whether it is wages. Wages may be set "on the basis of piecework, or a percentage of profits; and may be paid hourly, daily, weekly, monthly, or annually." Treasury Regulations, Section 31.3401(a)–1(a)(3), Appendix, *infra*, p. 3A.

These regulatory definitions of "wages" are a more detailed formulation of the first category of "gross income" set forth in Section 61(a)(1)—"Compensation for services, including fees, commissions, and similar items." See also Treasury Regulations on Income Tax, Section 1.61–2(a)(1). Thus, assuming the existence of an employer-employee relationship, the definition of "wages" corresponds to the type of "gross income" described in Section 61(a)(1).

As we have argued in our brief in *Commissioner* v. *Kowalski*, No. 76–1095,[4] employer reimbursements for meals consumed by employees during non-overnight travel are includable in the employees' gross income within the meaning of Section 61(a) and are not otherwise excludable under Section 119. That latter provision excludes from an employee's gross income the value of meals in kind furnished by his employer on the employer's business premises. Since the definition of gross income encompasses all receipts "from whatever source derived" unless specifically exempted by statute and the cash payments to petitioner's employees are not meals in kind furnished on the business premises of the employer, they are includable in the employees' gross income and subject to tax.

Unlike the respondent in *Kowalski*, petitioner does not contend that the cash payments at issue in this case are excludable from gross income or eligible for the special exclusion of Section 119 for meals in kind furnished on the business premises of the employer. Indeed, petitioner acknowledged before the district court that "there's no question that these items are income items" (Tr. 8). Moreover, as this Court held in *United States* v. *Correll*, 389 U.S. 299, petitioner's employees could not deduct the cost of these meals as

[4] We have provided counsel for petitioner with a copy of our brief in *Commissioner* v. *Kowalski*.

a business expense under Section 162 of the Code because they were consumed during non-overnight travel. Thus, the payments at issue in this case are fully includable in the employees' taxable income under Section 63(a).

However, petitioner argues that while the meal payments may be taxable income, they are not "wages" subject to withholding because they are (Br. 6) "noncompensatory payments to employees made in furtherance of [its] business." But petitioner's characterization of the meal payments as "noncompensatory" ignores the fact that the allowances were, as the court of appeals correctly observed, "part of a total package of remuneration designed to attract and hold good employees to the company" (Pet. App. B 11a). As we shall show, petitioner's payment for its employees' lunches, like their salary, vacation pay, or any other benefits arising out of their employment, was "remuneration * * * for services performed" and therefore "wages" within the meaning of Section 3401(a).[5]

B. THE MEAL ALLOWANCES PAID BY PETITIONER TO ITS EMPLOYEES ARE COMPENSATORY "REMUNERATION FOR SERVICES" WITHIN THE MEANING OF SECTION 3401(a)

1. It is undisputed that the meal allowances were paid in the context of the employer-employee rela-

[5] Petitioner's argument that the meal allowances are noncompensatory is essentially identical to the taxpayer's argument in *Commissioner* v. *Kowalski* (No. 76-1095) that such allowances are excludable from "gross income" under Section 61(a). See pp. 28-32 of our brief in *Kowalski*.

tionship and that they were not gifts (cf. Section 102(a); *Commissioner* v. *Jacobson*, 336 U.S. 28, 47-52). Since these payments provided petitioner's employees with a valuable personal benefit, they necessarily fall within the scope of the category of "gross income" described in Section 61(a)(1)—"Compensation for services, including fees, commissions, and similar items." Given the equivalent scope of Sections 61(a)(1) and 3401(a), the meal allowances are likewise "remuneration * * * for services performed by an employee for this employer" within the meaning of that latter provision and therefore "wages."

The record fully supports the court of appeals' conclusion that petitioner's meal allowances were compensatory. Petitioner required its employees to perform their assigned services at places it determined. In exchange for the performance of their services, the employees became entitled to certain agreed-upon benefits pursuant to the union contract. If an employee worked at his normal duty station, he received wages; if the employee were assigned to a more remote location on non-overnight travel, he received both the amounts designated as wages and the meals allowance. Conversely, if the employee performed no services, he would receive neither wages nor the meal allowance.

Hence, there was a direct causal connection between the receipt of the meal allowance and the performance of services. As the Second Circuit observed in holding that an employer's cash payments to its employees for the successful completion of a training course con-

stituted "wages," "[t]he * * * payments * * * represented part of the benefit package which was negotiated as part of the wage structure under the collective bargaining agreement * * *. The payments ultimately derived from the employers and represented a portion of the agreed upon remuneration * * * within the intent of Section 3401(a), just as do payments from pension and vacation funds." *Educational Fund of the Electrical Industry* v. *United States,* 426 F. 2d 1053, 1056 (C.A. 2). Here, too, the meal allowance and its amount were established as a result of bargaining between petitioner and its employees' union. There is accordingly no qualitative difference between the meal allowance and any other element of the employees' compensation.[6]

The meal allowance is therefore comparable to any other type of personal economic benefit that an employer might provide an employee in exchange for his services, such as vacation pay, pension allowances, personal use of a company car, tuition payments for children, and the like. In each of these instances, the employee gains by the benefit, for he would otherwise have to bear the cost of these items himself. Similarly, in this case, if petitioner did not pay for its employees' lunches when they were engaged in non-overnight

[6] Petitioner (Br. 18) would distinguish *Educational Fund of the Electrical Industry* on the ground that the payments there involved were made in lieu of and as a substitute for actual pay. But petitioner can hardly deny that an employer may provide his employees with personal benefits in addition to their basic salary that would also qualify as "wages." The essential point of the decision is that when, as here, such benefits constitute the agreed-upon remuneration, they are "wages" subject to withholding.

travel, they would have had to purchase their own lunch.

The meal allowances were therefore part of the total consideration paid by petitioner in exchange for a person assuming the status of one of its employees. The conclusion is accordingly inescapable that the meal allowances in this case were compensatory "remuneration * * * for services" under Section 3401(a) and therefore subject to withholding taxes.

2. This analysis finds support in the decisions of this Court defining compensation for purposes of the tax statutes. In *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716, the Court held employees taxable on the amount of their income taxes paid by their employers. The Court stated that "[t]he taxes were paid upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor" (*id.* at 729) and that "[t]he payment for services, even though entirely voluntary, was nevertheless compensation within the statute" (*id.* at 730).

Likewise, in *Commissioner* v. *LoBue,* 351 U.S. 243, the Court ruled that an employer's transfer of stock to his employee at less than its fair market value resulted in taxable income to the employee. The Tax Court had upheld the taxpayer's contention that there was no taxable income on the ground that one purpose of the employer was to confer a "proprietary interest" and thereby provide the employees with "an incentive to promote the growth of the company * * *" (22 T.C. 440, 445). But since it was undisputed that

the employer's transfer was not a gift, the Court rejected the relevance of the employer's purpose in making the transfer, stating that "it seems impossible to say that it was not compensation" (351 U.S. at 247). As the Court further observed, "[w]hen assets are transferred by an employer to an employee to secure better services they are plainly compensation. * * * LoBue received a very substantial economic and financial benefit from his employer prompted by the employer's desire to get better work from him. This is 'compensation for personal service' within the meaning of § 22(a) [of the 1939 Code]" (*ibid.*). See also *Commissioner* v. *Smith,* 324 U.S. 177, 182.

In *Social Security Board* v. *Nierotko,* 327 U.S. 358, the Court held that a back pay award under the National Labor Relations Act constituted "wages" for purposes of the Social Security Act. Like Section 3401(a), the Social Security Act defined "wages" as "all remuneration for employment" and defined employment as "any service, of whatever nature, performed * * * by an employee for his employer * * *." In support of its contention that a back pay award was not "wages," the Social Security Board contended that the plaintiff did not perform any particular service for the back pay award. But the Court refused to adopt the Board's "limited circumscription of the word 'service'" (*id.* at 365). As the Court stated, "[w]e think that 'service' as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship

for which compensation is paid to the employee by the employer" (id. at 365–366).[7]

Finally, in *Otte* v. *United States,* 419 U.S. 43, 49–50, the Court again rejected the claim that a payment could only fall within the category of "wages" if it were attributable to the performance of a particular service at or near the time of payment. The Court observed that in defining "employer," Section 3401 (d) "twice refers to services that the employee 'performs or performed.' It thus speaks in the past tense as well as the present and thereby plainly reveals that a continuing employment relationship is not a prerequisite for a payment qualification as 'wages.'" Accordingly, if a payment is owing as a result of an employment relationship, it is "wages" as long as it is part of the total of personal benefits that arose out of that relationship.

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[7] Both the Fourth Circuit in *Royster Co.* (479 F. 2d at 390) and the court below (Pet. App. B 10a n. 2) recognized that the term "wages" under the social security tax provisions has "the same essential meaning" as under the income tax withholding statutes. Thus, with respect to the definition of "wages" under the social security provisions, the House Report stated that "[w]ages include not only the cash payments made to the employee for work done, but also compensation for services in any ther form, such as room, board, etc." H.R. Rep. No. 615, 74th Cong., 1st Sess. 32 (1935). See also S. Rep. No. 628, 74th Cong., 1st Sess. 49 (1935).

Under the current social security tax regulations, there is an exclusion from "wages" for "facilities or privileges" provided by an employer to his employees, *e.g.*, entertainment, medical services, or courtesy discounts, if such benefits are of relatively small value. However, the term "facilities or privileges" does not ordinarily include "the value of meals or lodging furnished * * * since generally these items constitute an appreciable part of the total remuneration of such employees." Treasury Regulations, Section 31.3121(a)–1(f), Appendix, *infra*, pp. 2A–3A.

3.a. Petitioner does not deny that it paid the meal allowances in the context of the employer-employee relationship. However, it argues (Br. 6) that while the allowances may be taxable income, they were not "wages" because they were noncompensatory payments made in furtherance of its business and were not paid for the performance of any specific service. In petitioner's view (Br. 21), the fact that its employees were not on duty during their noon meal period renders the meal allowances noncompensatory because they were unrelated to the value of their services or their seniority status.

But petitioner's characterization of the allowance as "noncompensatory" is at odds with the Court's definition of compensation under the tax statutes (see *supra,* pp. 17–19). Moreover, petitioner's contention that the payments at issue were not "wages" because they were unrelated to any employee services is likewise erroneous. As we have pointed out *supra,* pp. 18–19, the Court rejected virtually the identical argument more than 30 years ago in *Social Security Board* v. *Nierotko, supra.* The statutory concept of "wages" is not tied to the performance of any particular service, but includes any personal economic benefit given by an employer to his employee as a result of the employment relationship.

Thus, for example, an employer may provide vacation pay with respect to periods during which the employee performs no services whatsoever. However, it cannot be seriously contended that vacation pay is not "wages" subject to withholding. See *Campbell Sash Works, Inc.* v. *United States,* 217 F. Supp. 74

(N.D. Ohio). The essential point is that vacation pay is a personal economic benefit to the employee arising out of the employment relationship. Like special bonuses, bargain stock options, or reimbursements for personal expenses such as housing costs, school tuition or income taxes, an employer need not provide such benefits for any specific services performed in the past or to be performed in the future. To the contrary, an employer extends these benefits to his employee "to enlist more efficient service," "to secure better services," or because of "the employer's desire to get better work from him." *Commissioner* v. *LoBue, supra,* 351 U.S. at 247.[8] See also *United States* v. *Woodall,* 255 F.2d 370, 372 (C.A. 10), certiorari denied, 358 U.S. 824.

For purposes of the tax law, there is accordingly no difference between such benefits and traditional wage or salary payments. They are both taxable "[c]ompensation for [personal] services" under Section 61(a)(1) and "remuneration * * * for services performed by an employee for his employer" under the equivalent definition of "wages" set forth in Section 3401(a).[9]

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[8] Petitioner seeks to minimize the impact of *LoBue* by characterizing the decision (Br. 17) as a "broad definition of income." But the court below correctly recognized that *LoBue* directly addressed the question of what "constitutes remuneration for employee services" (Pet. App. B 9a). Given the equivalence between Sections 61(a)(1) and 3401(a) in the context of the employer-employee relationship, the Court's decisions with respect to "gross income" in that context are highly instructive in determining the scope of the statutory definition of "wages."

[9] Petitioner argues (Br. 21) that the amounts of the meal allowances were unrelated to the employees' seniority. But the record

b. *Royster Co.* v. *United States*, 479 F. 2d 387 (C.A. 4), upon which petitioner places its principal reliance (Br. 6, 16–18, 24), was therefore wrongly decided, and the court below properly refused to follow it. In *Royster Co.*, the court held that similar payments for noon meals consumed by salesmen engaged in non-overnight travel were not "wages" under Section 3401(a). The court's decision rests upon three grounds: (1) the salesmen were not required to do anything to qualify for the payments other than to eat on the road; (2) the salesmen performed no services while eating; and (3) providing the salesmen with meal allowances enabled the employer to save the mileage costs it would have incurred if the salesmen returned home to eat lunch (see *id.* at 390–391).

The first ground adopts an erroneously narrow view of the meal allowance. Contrary to the Fourth Circuit's assumption, the salesmen did not qualify for the payment simply by eating their noon meal on the road; they were required to be engaged in a sales mission on behalf of their employer that took them away from their home base of employment. Here, too, petitioner's employees were only eligible for the meal allowance if they were in the midst of a non-overnight travel assignment on behalf of petitioner at the time of their noon meal. Hence, there was a direct *quid pro quo* between the employee's performance of services and his eligibility for the meal payment.

shows that the senior non-union employees were reimbursed for their actual meal expenses up to $25 per meal (Pet. App. B 7a; Tr. 29–30, 44–45). At all events, the fact that the amount of the meal allowances was uniform would not necessarily exclude them from the definition of "wages." For example, if an employer provides each of his employees, regardless of rank, with an automobile for his personal use, the value of that privilege would be "wages" subject to withholding.

The second and third grounds are irrelevant to the question whether the meal allowance is "wages." The fact that the employees performed no particular service while eating lunch does not show that the meal payments were not wages. Indeed, this Court's definition of "wages" under the social security statutes refutes the court of appeals' conclusion.

Under those analogous provisions, the Court has defined "service" to include "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Social Security Board* v. *Nierotko, supra,* 327 U.S. at 365–366 (footnote omitted) (see *supra,* pp. 18–19). Thus, the employee's temporary respite from his labors during his noon meal hour does not exclude the meal allowance from "wages" under Section 3401(a), any more than his leisure during vacation would exclude vacation pay from "wages" (see pp. 20–21, *supra*). "The decisions of this Court leave no doubt that a man's time may, as a matter of law, be in the service of another though he be inactive. *E.g., Armour & Co.* v. *Wantock,* 323 U.S. 126. This is, practically speaking, the ordinary situation of employment in a 'stand-by' capacity" (327 U.S. at 370–371, Frankfurter, J., concurring).

Finally, the fact that an employer might choose to provide meal allowances and thereby save the mileage costs of his employees' transportation back to their home base does not support the exclusion of the allowances from the definition of "wages." To begin with, such an analysis cannot stand in the face of the Court's admonition that "[t]ax consequences follow what has taken place, not what might have taken place." *Central Tablet Mfg. Co.* v. *United States,* 417 U.S. 673, 690; *Commissioner* v. *National Alfalfa Dehydrating & Milling Co.,* 417 U.S. 134, 148–149, and cases cited therein. Moreover, there is no basis for the Fourth Circuit's assumption in *Royster Co.* that the employer was obliged to pay either for his employees' noon meals or the cost of transporting the employees back to the home office for their lunch period.

To the contrary, the employer could have let the salesmen bear the cost of their own lunches, as employees are required to do in most cases. But once the employer agrees, as petitioner did, to subsidize the cost of his employees' personal meals, the court of appeals correctly concluded that the reimbursements "are part of a total package of remuneration designed to attract and hold good employees to the company. As such, they must be considered 'wages' under 26 U.S.C. § 3401(a) for withholding tax purposes" (Pet. App. B 11a; footnote omitted).

C. THE MEAL ALLOWANCES ARE NOT REIMBURSEMENTS FOR DEDUCTIBLE BUSINESS EXPENSES

1. Petitioner further argues (Br. 12) that the meal allowance are not "wages" because they are reimbursements of travel and other ordinary and necessary business expenses. In support of this contention, petitioner relies upon Treasury Regulations, Section 31.3401(a)–1(b)(2), which provides that "[a]mounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding."

The court of appeals correctly rejected petitioner's attempt to analogize its employees' expenses for meals consumed during non-overnight travel to "traveling or other bona fide ordinary and necessary expenses incurred * * * in the business of the employer" (see Pet. App. B 11a–12a n. 3). The phrase "ordinary and necessary expenses" is a statutory term of art that refers to deductible business expenses under Section 162(a) of the Code. See *Welch* v. *Helvering,* 290 U.S. 111, 113–115. However, Section 262 bars any deduction "for personal, living, or family expenses."

As we have pointed out *supra,* pp. 13–14, in *United States* v. *Correll,* 389 U.S. 299, the Court held that a taxpayer traveling on business may deduct the cost of his meals under Section 162(a)(2) as "traveling expenses" incurred in the pursuit of business "while away from home" only if his trip required him to

stop for sleep or rest. In so ruling, the Court approved the Commissioner's "overnight rule" which was first expressed in a 1940 ruling, I.T. 3395, 1940–2 Cum. Bull. 64. Thus, expenses for meals consumed during non-overnight travel are non-deductible personal expenses under Section 262.

Viewed in the light of the Commissioner's long-standing overnight rule, the employees' noon meal allowances are not reimbursements for deductible business expenses within the meaning of the Regulation so as to exclude them from the statutory definition of "wages." The thrust of the Regulation is to exclude from "wages" only those payments that would be subtracted from the recipient's taxable income by means of an offsetting business expense deduction.[10] Here, however, the employees were not engaged in overnight travel so that the meal payments were not travel expenses.

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[10] The Regulation is therefore consistent with various statutory exclusions from the definition of "wages" for payments that are not subject to income tax (Section 3401(a)(1)—combat pay allowance; Section 3401(a)(8)(A)(ii)—exclusion for income earned abroad), or where at the time of payment it is reasonable to believe that a corresponding deduction would be allowable (Section 3401(a)(15)—moving expense allowance).

Accord: Rev. Rul. 69–592, 1969–2 Cum. Bull. 193 (per diem allowances for meals consumed in non-overnight travel not subject to withholding unless it is reasonable to believe that the total travel allowances paid to an employee will exceed his deductible travel expenses for the taxable year). While petitioner (Br. 24 n. 19) attacks this ruling as "unworkable," an employer surely can estimate whether the reimbursements provided to his employees can reasonably be expected to exceed his actual expenses.

Moreover, the meal allowances were not "ordinary and necessary" business expenses deductible by the employees since the cost of an employee's lunch is not an "ordinary and necessary expense[ ] * * * incurred in the business of the employer" no matter where or in what circumstances the meal is eaten. Since the meal allowances are fully includable in the employees' income and not deductible to any extent, they are properly subject to withholding taxes like any other type of "wages."

2. Once it is recognized that the meal allowances are includable in the employees' gross income and not deductible by them as business expenses, the lower court decisions upon which petitioner relies (Br. 15–16) are distinguishable.[11] For example, the exclusion from "wages" of the value of a trip to a bona fide business convention that was upheld in *Peoples Life Insurance Co.* v. *United States,* 373 F.2d 924 (Ct. Cl.), involved overnight travel on behalf of the employer that would be deductible as a business expense by the employee. The case therefore falls within the exclusion from wages provided by Treasury Regulations, Section 31.3401(a)–1(b)(2), Appendix, *infra,* p. 3A (see 373 F. 2d at 935). Accord: *Acacia Mutual Life Insurance Co.* v. *United States,* 272 F. Supp. 188 (D. Md.). Cf. *Rudolph* v. *United States,* 370 U.S. 269; *Patterson* v. *Thomas,* 289 F.2d 108 (C.A. 5), certiorari denied, 368 U.S. 837.

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[11] The only appellate decision involving the same type of allowance for meals consumed during non-overnight travel is *Royster Co.* v. *United States,* 479 F. 2d 387 (C.A. 4.), which we submit was wrongly decided (see pp. 22–24, *supra*).

In this respect, the value of the convention trip to the employee was akin to any other type of cash advance made by an employer to enable his employee to obtain meals and lodging during overnight travel or to incur such expenses solely for the benefit of his employer. In those circumstances, the employee is entitled to deduct such expenses if the trip is "related primarily to [his] trade or business." See Treasury Regulations, Section 1.162–2(b)(2). Since such payments were not includable in the employees' taxable income, they were held not to be "wages" subject to withholding (see pp. 25–27, *supra*).[12]

Here, however, the meal allowances petitioner provides are not deductible by the employees as business expenses.[13] Hence, petitioner's subsidy of the cost of what is undisputably a nondeductible personal ex-

[12] *Stubbs, Overbeck & Associates, Inc.* v. *United States*, 445 F.2d 1142 (C.A. 5), upon which petitioner relies (Br. 16), is likewise distinguishable. There, the court ruled that an employer's per diem payments to his employees assigned to remote job sites were not "wages" subject to withholding. But the court's decision turned upon the fact that the employee's assignment was away from home overnight, so that his expenses were deductible. The court rejected the Internal Revenue Service's position (Rev. Rul. 59–371, 1959–2, Cum. Bull. 236) that an assignment for more than 12 months lost its character as a temporary job away from home. See *Peurifoy* v. *Commissioner*, 358 U.S. 59.

[13] Thus, the district court's observation (Pet. App. A 3a), that "[a]s a practical matter, [the meal allowance] could hardly be considered a money making proposition for an employee" is beside the point. If the sum of an employee's non-deductible personal expenses exceeds his compensation, his entire remuneration could likewise be characterized as not a "money making proposition." But that fact would not exclude his remuneration from "wages" subject to withholding.

pense is fully includable in their tax base and subject to withholding.[14]

3. Finally, petitioner challenges (Br. 11) the court of appeals' conclusion that classification of the meal allowances as "wages" "harmonizes well with the underlying purposes of the withholding tax system to collect income at its source and to prevent unexpected burdensome tax liabilities come April 15" (Pet. App. B 10a). But the exclusion of interest and dividend income from the withholding tax base petitioner cites (Br. 11) does not support its argument that the meal

[14] Nothing in *Humble Oil & Refining Co.* v. *United States*, 442 F.2d 1362 (Ct. Cl.), or *Allstate Insurance Co.* v. *United States*, 530 F. 2d 378 (Ct. Cl.), cited by petitioner (Br. 16, 20), casts doubt on the correctness of the decision below. Those cases dealt with the particularized allowance for moving expenses, and held that certain direct and indirect moving expense allowances provided by an employer to its employees were not wages subject to withholding. However, in *Humble Oil*, the court found persuasive the fact that the Internal Revenue Service's published rulings drew a distinction between such allowances to existing and to new employees, and concluded that only the payments to new employees were taxable income (see 442 F.2d at 1369–1370). In *Allstate Insurance Co.*, the court rejected the government's argument that the 1964 enactment of the deduction for direct moving expenses (Section 217) and the concomitant exclusion of direct moving expense reimbursements from the definition of "wages" (Section 3401(a)(15)) rendered indirect moving expense allowances subject to withholding. Thus, both of these cases are far afield from the proper treatment of meal allowances at issue here.

Finally, none of the published rulings petitioner cites (Br. 15) supports its position that the meal allowances are not wages. Each of those rulings involved a situation in which a payment was made before the commencement of an employment relationship or after or in exchange for its termination.

allowances are not "wages." Those items do not arise out of the employment relationship and are therefore not "remuneration * * * for services performed by an employee for his employer."

Indeed, the legislative history confirms the court of appeals' observation that subjection of the meal allowances to withholding tax is consistent with the congressional intention to collect income taxes currently at their source. The Senate Committee report (S. Rep. No. 1631, 77th Cong., 2d Sess. 165 (1942)) cited by petitioner (Br. 11, n. 5) indicates that all remuneration paid by an employer to his employee is subject to withholding taxes if it is includable in the employee's income tax base. As that report noted, the exclusion from wages for wartime military pay (which corresponded to its partial exclusion from gross income (see Revenue Act of 1942, Section 117, 56 Stat. 814)) "[did] not extend to remuneration in the form of pensions and retired pay, if such remuneration [was] includible in gross income under the provisions of section 22 of the Code" (*id.* at 166).[15] Since the meal payments at issue here are fully includable in the employees' gross income and are not deductible or otherwise excludable from their tax base, they likewise fall within the statutory definition of "wages" in Section 3401(a).[16]

[15] See Section 112 of the 1954 Code, which provides an exclusion from gross income for armed forces combat pay. Section 3401(a)(1) likewise excludes such amounts from the definition of "wages." See p. 26, n. 10, *supra*.

[16] As a practical matter, the only reliable means of insuring that the employees will report the meal allowances as income is to subject them to income tax withholding and require their inclusion on the employees' Wage and Tax Statements (Form W-2). For example, in *Commissioner* v. *Kowalski*, No. 76-1095, the taxpayer did not report his meal allowances as income until his employer began to withhold income taxes on them and include them in "wages" on the Form W-2. See Brief for the Petitioner, *Commissioner* v. *Kowalski*, pp. 4–5, nn. 4 and 5.

II.

IF THE MEAL ALLOWANCES ARE WAGES, THE COMMISSIONER'S ASSESSMENT OF UNPAID WITHHOLDING TAXES AGAINST PETITIONER FOR AN OPEN YEAR UNDER THE STATUTE OF LIMITATIONS WAS A PROPER EXERCISE OF HIS AUTHORITY TO ENFORCE THE INTERNAL REVENUE LAWS

Petitionr argues (Br. 25–32) that even if the Court holds, in accordance with our submission, that the meal allowance are "wages" subject to withholding, it is nevertheless entitled to prevail in this refund suit because the Commissioner's assessment for 1963 was a "retroactive imposition" and tantamount to an "abuse of discretion" (Br. 25). In petitioner's view, it should be relieved of the withholding obligation for the year in suit because it was reasonable for it to believe that the meal allowances were not "wages" subject to withholding. Since petitioner would have otherwise collected the taxes at issue from the meal payments, it contends (Br. 25) that it should not be obligated to be a "guarantor" of tax payments later deemed to be subject to withholding.

As a general matter, the only restriction on the Commissioner's authority to assess taxes (Section 6201(a)) in accordance with his obligation to enforce

and administer the internal revenue laws (Sections 7801, 7802) is the three-year statute of limitations (Section 6501(a)). Here, petitioner's "retroactivity" argument does not rest on a claim that the assessment is barred by the applicable period of limitations. Rather, petitioner contends that in 1963 it was reasonably justified in believing that the meal allowances were not wages and that such belief should override what would otherwise be a valid timely assessment.

But the Commissioner's position with respect to the meal allowances is precisely the same as it was in 1963. Then, as now, the Commissioner maintained that the costs of meals consumed in non-overnight travel were non-deductible personal expenses. Indeed, as the Court noted in *United States* v. *Correll, supra,* 389 U.S. at 302 n. 10, the Commissioner first announced his overnight rule in 1940 in I.T. 3395, 1940–2 Cum. Bull. 64, prior to the enactment of the withholding tax provisions. From that time forward, "the Commissioner has consistently construed travel 'away from home' to exclude all trips requiring neither sleep nor rest, regardless of how many cities a given trip may have touched, how many miles it may have covered, or how many hours it may have consumed" *United States* v. *Correll, supra,* 389 U.S. at 302–303 (footnotes omitted).[17]

Thus, petitioner had ample notice since 1940 that the Commissioner viewed the meal allowances as fully

[17] Contrary to petitioner's argument (Br. 26), the situation is therefore distinguishable from *Humble Oil & Refining Co.* v. *United States, supra,* in which the Commissioner's published rulings provided the employer with a reasonable basis for concluding that moving allowances paid to existing employees were not subject to withholding. See p. 29, n. 14, *supra.*

includable in the employees' gross income without any deduction or offset. While petitioner argues (Br. 32) that the Commissioner's overnight rule did not address the question whether such allowances were wages subject to withholding, the promulgation of that rule confirmed that the Service would not accept the claim that such allowances for non-overnight meals were "advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer." Treasury Regulations, Section 31.3401 (a)–1(b)(2) (see p. 3A, *infra*).[18]

Since the meal allowances were an important element of the employees' compensation and did not

[18] Since the Commissioner published the overnight rule in 1940, there is no basis for petitioner's contention (Br. 30) that "[i]n 1963, not one regulation, revenue ruling or judicial decision required withholding on any travel expense reimbursements." Although petitioner now asserts that the Commissioner's overnight rule has no relation to the question whether the meal allowances are wages subject to withholding, it nevertheless claims (Br. 31) that the decision in *Ahrens* v. *United States*, 264 F. Supp. 518 (S.D. Ill.), allowing one of its employees to deduct the meal allowance, provided it with a reasonable basis for believing that the payment was not wages. In its petition for rehearing in the court of appeals (p. 2), petitioner likewise claimed that it was reasonable for it to believe that its "employees would be entitled to income tax deductions for the amounts of the reimbursements." At all events, in deciding in 1963 not to withhold taxes from the meal allowances' petitioner cannot claim to have relied upon the district court's opinion in *Ahrens*, which was not rendered until 1967.

qualify as deductible business expenses, petitioner could not have reasonably believed that the allowances were not wages.[19]

Nor can petitioner draw any support from other pre-*Correll* decisions such as *Hanson* v. *Commissioner,* 298 F.2d 391 (C.A. 8); *Williams* v. *Patterson,* 286 F.2d 333 (C.A. 5); *Chandler* v. *Commissioner,* 226 F.d 467 (C.A. 1); or *Scott* v. *Kelm,* 110 F. Supp. 819 (D. Minn.) (Br. 31). Apart from the fact that it was the posture of the Commissioner, and not the court decisions in other jurisdictions, that petitioner had to consider in determining whether it could safely fail to withhold taxes on the meal allowances, the courts that had rejected the overnight rule proposed other tests for deductibility that petitioner's employees would have failed to meet. See *Hanson* v. *Commissioner, supra,* 298 F.2d at 395–396 n. 3.[20]

[19] Petitioner asserts (Br. 30 n. 29) that "[t]he government is well aware that employers heretofore have not been apprised of the need to withhold." But when read in context, the excerpt from our reply brief in the court of appeals quoted by petitioner does not support its contention that employers were not aware that such meal allowances were subject to withholding. The quoted statement was made as part of a request that if the court of appeals affirmed the district court on the basis of petitioner's "retroactivity" argument, that it also rule on the merits in order to clarify the uncertainty arising from the Fourth Circuit's 1973 *Royster Co.* decision. If the court of appeals had not ruled on the merits, we suggested that petitioner's "alternative [retroactivity claim] would become self-perpetuating" (Reply Br. 15) because employers could claim reliance on *Royster Co.* and avoid a ruling on the merits. For the convenience of the Court, we are lodging with the Clerk copies of the briefs filed in the court of appeals.

[20] For example, in *Williams* v. *Patterson, supra,* upon which petitioner relies (Br. 31), the Fifth Circuit permitted the deduction only if it were reasonable for the employee to need and to obtain sleep or rest during the trip, despite the fact that he might not be away from home for longer than an ordinary work day (see 286 F. 2d at 340). See also *Osteen* v. *Commissioner,* 14 T.C. 1261, 1262, and *Herrin* v. *Commissioner,* 28 T.C. 1303.

In the absence of any factual or legal basis upon which petitioner could have concluded that its meal allowances were not subject to withholding, the Commissioner's assessment of the unpaid taxes does not work any unfairness upon it and is not an impermissible abuse of discretion. Section 3403 of the Code imposes an absolute liability upon the employer "for the payment of the tax required to be deducted and withheld under this chapter." If an employer does not withhold taxes on wages to his employees, he is primarily liable for the payment of such taxes. The fact that petitioner could have collected the taxes from the amounts paid to his employees but failed to do so does not relieve petitioner of its statutory liability for the tax.[21]

Indeed, petitioner easily could have protected itself from the risk of having to pay the tax by seeking a ruling from the Commissioner as to whether the meal allowances were wages subject to withholding. Its failure to seek clarification of the scope of its statu-

[21] The situation is analogous to the various excise taxes imposed upon manufacturers of various items such as automobiles, tires, and firearms. See, *e.g.*, 26 U.S.C. 4061 *et seq.* While the manufacturer may pass on the economic burden of those taxes to the retailers by increasing the wholesale price, his failure to do so does not relieve him of the statutory obligation to pay the tax. Thus, Section 6416(a)(1) of the Code provides that a manufacturer cannot claim a refund for excise taxes unless it has (1) not included the tax in the price of the article; (2) repaid the amount of the tax to the ultimate purchaser; (3) repaid or agreed to repay the tax to the retailer; or (4) filed with the Commissioner the written consent of the retailer to the making of the refund.

tory obligation prior to the payment of the meal allowances should not defeat the collection of a valid and timely assessment.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C. (1958 ed.)):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

* * * * *

SEC. 3401. DEFINITIONS.

(a) *Wages.*—For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his em-

ployer, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

SEC. 3402. INCOME TAX COLLECTED AT SOURCE.

(a) [as amended by Sec. 2(a), Act of August 9, 1955, c. 666, 69 Stat. 605] *Requirement of Withholding.*—Every employer making payment of wages shall deduct and withhold upon such wages (except as provided in subsection (j)) a tax equal to 18 percent of the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection (b)(1).

* * * * *

SEC. 3403. LIABILITY FOR TAX.

The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

Treasury Regulations on Employment Taxes (1954 Code) (26 C.F.R.):

§ 31.3121(a)–1 *Wages.*

* * * * *

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

* * * * *

§ 31.3401(a)–1 *Wages.*

(a) *In general.* * * *

(2) The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of the statute if paid as compensation for services performed by the employee for his employer.

(3) The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and may be paid hourly, daily, weekly, monthly, or annually.

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(b) *Certain specific items*—* * *

(2) *Traveling and other expenses.* Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. * * *

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